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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 297

UNION TRUST COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The United States has itself filed a petition for a writ of certiorari to review the decision of the court below in this cause (No. 296, Oct. T. 1955, *United States of America, Petitioner* v. *Union Trust Company, et al.*). We suggested there that the decision below, imposing an unprecedented liability upon the United States for alleged negligence in the performance of a purely regulatory function, and the rationale employed in reaching that result, present serious questions of current and future importance in the administration of the Federal Tort Claims Act. We did not, of course, raise the question brought forward in the

instant petition, which was decided adversely to the present petitioners, *viz.*, whether, under 28 U. S. C. 1346 (b), which provides that the United States shall be liable "in accordance with the law of the place where the act or omission occurred," such liability shall be determined under the law of the place where the negligent conduct occurred, or under the law of the place where the negligent conduct had its effect.[1]

Should the Court grant our petition for certiorari in No. 296, we do not oppose the granting of the instant petition. We believe it would then be appropriate and desirable that the entire Tort Claims Act case be before the Court for review. On the other hand, if our petition in No. 296 is

[1] The majority of the court below held that the explicit language of the Act requires application of the law of the place where the negligent employee's act or omission occurred, even though this be a departure from the general conflicts rule which normally disregards the law of the place of conduct and, instead, applies the law of the place where that conduct had its effect. Since the air traffic controllers' negligent acts (issuing clearances to land) and omissions (failing to issue warnings) occurred in the control tower located in Virginia, the court below held that Virginia law measures the Government's liability. Under Virginia law applicable in 1949 when the accident happened, recoveries for wrongful deaths were limited to $15,000. Va. Code 1942, § 5787. The trial court, finding that the mid-air collision occurred in the District of Columbia, had applied the District law and had awarded damages in the amount of $50,000 for the death of Ralph F. Miller. The appellate court reduced the judgment to $15,000 to accord with the Virginia law. See U. S. Pet. in No. 296, App A., pp. 39a–44a.

denied, we oppose the instant petition, first, because the additional question presented is not, of itself, of sufficient general importance at this time to warrant independent review, and, second, because the court below, in this limited aspect of the case, reached the correct result.

1. Referring to the very substantial and increasing volume of litigation which has arisen under the Tort Claims Act, petitioners (Pet. p. 9) predict that the lower federal courts will, in the future, frequently be faced with the question raised in their petition. Experience, however, has demonstrated the contrary. The fact is that, despite the many thousands of cases under the Tort Claims Act since its enactment in 1946,[2] this particular question has very rarely arisen. Petitioners point to no conflict of opinion on the question; indeed, they admit that it "has not been directly passed upon by any other courts than those below in this case" (Pet. p. 4).[3] Nor do

[2] Department of Justice records disclose that there are approximately 1,000 Tort Claims Act suits instituted every year.

[3] None of the opinions in the Tort Claims Act cases cited by petitioners (Pet. p. 5) discusses the question. The issue was raised in *Dalehite* v. *United States*, 346 U. S. 15, where fertilizer manufactured in Nebraska and Iowa exploded in Texas. The majority of the Court, having held recovery barred by the governmental function exception, did not reach the question. The dissenting Justices apparently were of the view that the Act requires application of the law of the place where the negligent conduct occurred. 346 U. S. at 52–3.

they indicate that the question is involved in any pending case, apart from the litigation arising out of this accident. Unlike the questions we raise in No. 296, it does not appear that resolution of the issue presented here will have any immediate widespread effect beyond the particular facts and parties involved in this general litigation. Although the extent of this litigation gives it a certain importance in itself, we believe that, nevertheless, petitioners' question, standing alone, has not yet assumed sufficient general importance to warrant review by the Court.

2. The question presented appears to be answered by the language of the Act which, in explicit terms, states that the liability of the United States is to be determined by the law of the place where the government employee's act or omission occurred.[4] Petitioners argue that, de-

[4] Section 1346 (b) confers on the district courts jurisdiction of claims against the United States for property damage or for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where *the act or omission occurred.*" [Emphasis added.] Section 2672 uses identical language in authorizing the head of each federal agency to make administrative adjustments of claims of $1,000 or less. See also Section 2674, which states that the Government shall be liable to the same extent as a private individual in like circumstances, and which provides in a paragraph added in 1947 (61 Stat. 722) that if, "in any case wherein death was caused, where the law of the place *where the act or omission complained of*

spite the use of this language, Congress really intended that the law of the place where the act or omission occurred be totally ignored; that the plain meaning of the language is to be rejected (a) because the rule it prescribes differs from the general conflicts rule, (b) because there is an absence of legislative history indicating a Congressional purpose to depart from that general rule, and (c) because in some situations the rule stated in the statute might prove difficult to apply.

a. There is no more authoritative guide to meaning than the language of the statute itself, *Osaka Shosen Line* v. *United States,* 300 U. S. 98, 101. It is difficult to conceive of any more precise language which could possibly have been used by Congress to command application of the law of the place of the negligent conduct than the words which it did employ. If Congress had not intended to measure the Government's liability by reference to the law of the place where the act or omission occurred, and instead had desired to impose the law of the place of "the tort," as petitioners and the dissenting judge below suggest, it could easily have done so. Thus, it could have said that the Government shall be liable "in accordance with the law of the place where the cause of action arose" or "in accord-

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occurred, provides * * * for damages only punitive in nature, the United States shall be liable for actual or compensatory damages * * *." [Emphasis added.]

ance with applicable State law." Or Congress might have ended the relevant sentence of the section (see fn. 4, *supra*) by placing a period after the words "liable to the claimant," without adding the additional clause "in accordance with the law of the place where the act or omission occurred." (Cf. fn. 7, *infra*, p. 9.) But it chose not to do so. Instead, it specifically directed application of the law of the place where the act or ommission occurred.

To accept petitioners' contention that the words "act or omission" mean the "tort" or the "consequences" of the act or omission would delete the words Congress employed and would result in a construction directly opposite to the ordinary meaning of the language used, for, in determining the place of the "tort" or of the legal "consequences" of an act under the general conflicts rule, the law of the place where the negligent act or omission occurred is virtually ignored. Contrariwise, giving the words their natural meaning avoids the necessity of such deletion and gives full significance to the clause. It accords, moreover, with the consistent pattern of the statute which, in almost every section, distinguishes between the "act or omission," on the one hand, and the consequent claim which "arises out of" or is based upon" or is "caused by" the act or omission, on the other.

Moreover, adherence to the literal mandate and natural meaning of the clause has the sensible

advantage of adopting the law of the state (a) in which the federal employee is located and is controlled by his superiors, (b) which determines the applicable standard of care governing the federal employee, (c) which fixes the rights and privileges of the actor, and (d) which results in greater simplicity and certainty.

b. In construing a statute, courts start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. The language must be given its spontaneous meaning unless, perhaps, secondary legislative materials constitute "persuasive evidence" that a different meaning was intended; if the legislative materials resorted to are "without probative value, or contradictory, or ambiguous, * * * [they] will not be permitted to control the customary meaning of words." See *United States* v. *Dickerson*, 310 U. S. 554, 562.

Here, the ordinary meaning of the clause dictates a rule which differs from the general conflicts rule.[5] To compel the abandonment of the

[5] Departure from the general conflicts rule is but one of several instances under the Tort Claims Act in which the claimant's right to relief against the Government may differ from that which he might obtain against a private person in like circumstances. Among other instances are: the Act prescribes its own period of limitations which may be shorter than that of the state in which the tort occurs (28 U. S. C. 2401 (b)); the claimant cannot obtain trial by jury (*id.*, 2402); nor punitive damages, nor interest prior to judgment (*id.*, 2674); many specific torts are excluded from recovery (*id.*, 2680 (h)); etc.

natural meaning, it is necessary to find affirmative evidence, persuasive in nature, that Congress intended to retain the general conflicts rule. But the legislative data on which petitioners rely is sketchy and ambiguous and falls far short of persuading that the words were intended to mean the opposite of what they say. Thus, the Shea testimony (Pet. p. 7) can hardly be given probative value on this point because, as petitioners themselves recognize, his remarks were not addressed to the question of what law governs, but only to the venue provision. Obviously, considerations underlying problems of venue are substantially different from those determining applicable law.

Nor does the legislative history of the 1947 amendment of the Act shed any light (see fn. 4, *supra*, p. 4, and Pet. pp. 7–8[6]). To show that the general conflicts rule applies, petitioners stress the sentence in the Committee Reports that each case is determined "in accordance with the law of the state where the death occurred." But even under the general conflicts rule, it is not the law of the place of death that controls (one may be injured in Alabama and die in Georgia; under the general rule, the law of the place of injury applies—the place of death is

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These provisos merely illustrate the settled principle that, in consenting to suit against the Government, Congress may and does impose special conditions upon the right to sue.

[6] Petitioners refer to the amendment as "the 1948 amendment."

irrelevant). Clearly, the Committees were not addressing themselves to the problem of the multi-state torts, hence their reports are of no significance on this point.

Nor can the *absence* of legislative materials in support of the plain meaning of the words (cf. Pet. p. 7) be regarded as "persuasive evidence" that the plain meaning was not intended. Indeed, to permit the absence of legislative history to control the meaning of words used in a statute would be a total inversion of the rule stated in the *Dickerson* case, *supra*. Actually, the legislative history does contain support for the literal meaning.[7]

c. Petitioners suggest hypothetical situations in which it may be difficult to apply the rule

[7] Earlier tort claims bills provided that the United States "shall be liable to the same extent and in the same manner as a private individual under like circumstances," but did not contain the significant clause now in Sec. 1346 (b), *viz.*, "in accordance with the law of the place where the act or omission occurred." See Sec. 201 of S. 2690, 76th Cong., 1st Sess., and of H. R. 5373, 77th Cong., 2d Sess. The clause was inserted by a Committee revision of the proposed bills. The Committee described the change as "important" and explained that a "major difference is that the present [revised] bill subjects the determination of the validity of the claim, the defenses thereto, and the distribution of the recovery, to *the law of the place where the delinquent act or omission occurred*", *i. e.* to "the local law." Memorandum for the use of the Committee on the Judiciary, 77th Cong., 2d Sess.—Explanatory of Committee Print of H. R. 5373, pp. 6–7. [Emphasis added.]

required by the ordinary meaning of the clause (Pet. 9–11). But those particular difficulties—which are more likely to exist in briefs than in reality—cannot serve in themselves as justification for overturning the natural meaning in favor of a hidden or diametrically opposed reading. As the Court said in *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617–8:

> "The natural meaning of words cannot be displaced by reference to difficulties in administration." * * * For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. * * * After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

Respectfully submitted,

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